No. 05-669

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BP AMERICA PRODUCTION COMPANY AND ATLANTIC RICHFIELD COMPANY,
Petitioners,

v.

REJANE BURTON, ACTING ASSISTANT SECRETARY OF LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR FOR LAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY FOR PETITIONERS

The United States, joined by *amicus curiae* Jicarilla Apache Nation (the "Tribe"), agrees that the second question presented by the petition warrants this Court's review. It is common ground among the parties that the courts of appeals are divided on whether the statute of limitations codified at 28 U.S.C. § 2415(a) applies to the commencement of administrative proceedings. See Gov't Br. 19; Tribe Br. 6; Pet. 27. It is likewise common ground that that question is both important and recurring. As the United States (Br. 21) and the Tribe (Br. 7) explain, the issue affects thousands of leases for oil and gas and other minerals on Indian lands; numerous federal leases for minerals other than oil and gas; and a variety of other monetary disputes between private parties and the government. See also Pet. 30. In each of those contexts, the statute of limitations for bringing an administrative complaint—indeed, whether there is any limitations period at all—now depends wholly on the circuit in which the matter is eventually litigated. This Court should grant the petition and restore uniformity to this important area of law.

Contrary to respondents' position, however, the first question presented by the petition also warrants this Court's review. The Mineral Leasing Act of 1920 ("MLA"), 41 Stat. 437, codified at 30 U.S.C. § 181 *et seq.*, provides for the payment of royalties based on the "amount or value of production removed or sold from the lease." 30 U.S.C. § 226(b)(2)(A)(ii). The decision below holds that the MLA's text requires only that leasehold production subject to the royalty *originate* at the lease, so that royalties on such production can be based on the much higher value the production will have once it is transported to off-lease locations and improved in quality to finished, end-use condition. That construction is in direct conflict with decisions from the Ninth Circuit and prior decisions from the D.C. Circuit, which have held that the MLA imposes a "statutory

mandate" that royalty payments be based on the value of production *at the lease*. Pet. 17-18.

Like the statute of limitations issue, the construction of the MLA is an exceedingly important and recurring issue. The construction of the MLA affects the same leases as the statute of limitations issue—Indian leases and leases for minerals other than oil and gas—as well as thousands of additional federal oil and gas leases. These leases generate several billion dollars in royalties per year. Pet. 23; Gov't Br. 20-21.

I. The Court Should Resolve The Circuit Split Over The Meaning Of 28 U.S.C. § 2415(a).

A. Whether The Statute Of Limitations In 28 U.S.C. § 2415(a) Applies To Agency Orders Mandating The Payment Of Money Is Of Recurring Importance In Many Contexts.

The decision below expressly acknowledged that its holding directly conflicts with the decisions of other circuits. Pet. App. 18a. In this case, the D.C. Circuit joined the Fifth Circuit, see *Phillips Petroleum Co.* v. *Johnson*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994), in holding that the statute of limitations codified at 28 U.S.C. § 2415(a) does not apply to agency actions. Pet. 16a-20a. The Tenth Circuit and Federal Circuit have reached the opposite result. See *OXY USA, Inc.* v. *Babbitt*, 268 F.3d 1001 (10th Cir. 2001); *United States* v. *Hanover Ins. Co.*, 82 F.3d 1052 (Fed. Cir. 1996); see also Pet. 26. Like the court of appeals, respondents and the Tribe acknowledge the conflict. Gov't Br. 19; Tribe Br. 6-7.

The parties also agree that the issue is of such prospective importance that it warrants this Court's review. The United States, for example, notes that whether Section 2415(a) applies to royalties continues to arise in the context of Indian mineral leases and federal mineral leases other than oil and gas. Gov't Br. 21. In fiscal year 2005, those

leases generated over $1 billion in royalties. Gov't Br. 21; see also Tribe Br. 18; Pet. 30. The Court should therefore grant the petition and resolve the conflict among the courts of appeals on this issue.

B. The Limitations Period In 28 U.S.C. § 2415(a) Applies To Agency Orders Mandating The Payment Of Money.

Although respondents agree that the Court should grant review, they devote much of their brief to defending the decision below on the merits. Respondents begin by arguing that Section 2415(a)'s references to an "action for money damages" and a "complaint" connote judicial actions rather than administrative actions. Gov't Br. 15. That argument overlooks that Section 2415(a) does not simply refer to an "action for money damages" but to "*every* action for money damages." 28 U.S.C. § 2415(a) (emphasis added). As the Tenth Circuit observed, the reference to actions for money damages found in Section 2415 is "patently broad" and sufficient to encompass actions brought in both administrative and judicial forums. *OXY USA*, 268 F.3d at 1005. Furthermore, Congress has frequently used the term "complaint" in a variety of statutes to describe efforts to recover monetary compensation through administrative proceedings. See, *e.g.*, 15 U.S.C. § 45(b); 15 U.S.C. § 522; 25 U.S.C. § 2713; 29 U.S.C. § 160(b).

Respondents also argue that Section 2415(a), by its terms, provides that administrative proceedings will *extend* the time for filing in court, but that Section 2415(a) contains no limit on when an administrative proceeding may be initiated. Gov't Br. 16. That interpretation of Section 2415(a) cannot be reconciled with Congress's intent to have Section 2415(a) function as a broad, catch-all limitations period. *OXY*, 268 F.3d at 1005. As the Federal Circuit has explained, Congress could not have intended "agencies to be free to assert their claims at any time and by any means

other than court actions, unencumbered by the period of limitation imposed by section 2415(a)." *Hanover Ins. Co.*, 82 F.3d at 1055.

Respondents, moreover, do not dispute that their construction converts a provision of Section 2415(a) into mere surplusage. Gov't Br. 16. Subsection (i) of Section 2415 expressly states that administrative offsets are exempt from the limitations period imposed by Section 2415(a). If Section 2415(a) did not apply to administrative actions, then there would be no need to carve out a select type of administrative action from Section 2415(a). *OXY*, 268 F.3d at 1006. This Court, of course, will avoid any interpretation that renders even a word or phrase—much less an entire subsection—superfluous. *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); see also *Department of Revenue of Or.* v. *ACF Indus.*, 510 U.S. 332, 340 (1994) (rejecting result that "would contravene the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (internal quotation marks omitted).

While respondents attempt to escape the import of subsection (i) by relying on legislative history, Gov't Br. 16-17, this Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) (footnote omitted). Moreover, even if it were relevant, "[t]he legislative history in support of § 2415(a) indicates Congress was motivated * * * to reduce the costs of record keeping and encourage prompt agency actions on claims." *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858, 863 (10th Cir. 1993).

C. MMS Orders To Pay Royalties Seek Money Damages Founded On Contract.

Respondents argue that, even if Section 2415 applies to agency orders mandating the payment of money, Section 2415 does not apply to MMS orders to pay royalties. According to respondents, such orders do not seek the payment of "money damages" and are not based upon a contract. Respondents are mistaken on both counts.

The lower courts have long recognized that oil and gas leases are contracts. *OXY*, 268 F.3d at 1007-1008; *Phillips Petroleum Co.*, 4 F.3d at 860-861 & n. 1; *Reese Exploration, Inc.* v. *Williams Natural Gas*, 983 F.2d 1514, 1518-1519 (10th Cir. 1993). Indeed, the District Court below conceded that "the MMS order was based upon a contract * * * ." Pet. 54a. That comports with common sense. Absent a contractual agreement to pay royalties, the MMS would have no right to demand a royalty at all. The claim for money is thus founded on contract.

The fact that the MMS administers federal oil and gas leases in accordance with the MLA does not change the analysis. The legal source of the right to a royalty payment is the lease, not the statutes and regulations that govern the MMS's administration of the lease. The MMS's own rules make it clear that the contract is not a mere formality or an incident to governing rules and regulations. Where the terms of a lease are inconsistent with the regulations, the terms of the lease rather than the regulations govern the government's royalty rights. See 30 C.F.R. § 202.100(b)(3).

The United States cites one case to support its position that an action for past-due sums under an MMS lease is not an action for damages. That case, *Bowen* v. *Massachusetts*, 487 U.S. 879, 900 (1988), considered whether a suit seeking to enforce a statutory mandate, which happened to be one for the payment of money, was a suit for "money damages." The MMS orders here, however, did not seek to enforce a

statutory mandate. They sought money MMS believed to be due under a contract. That effort to recover past-due money under a lease is a paradigmatic suit for money damages founded on contract. See, *e.g.*, Corbin on Contracts § 55.6 (Interim Ed. 2005) (stating that the remedy of "damages" is an amount determined "with the purpose of putting the injured party in as good a position as that party would have occupied had the contract been fully performed by the defendant"). As the Tenth Circuit observed, an MMS claim to collect royalties is "substantively indistinguishable from other government claims to recover money owed under contracts governed by the limitations period in [Section] 2415." *OXY*, 268 F.3d at 1008.

II. The Court Also Should Address The Proper Construction Of The MLA.

A. The Courts Are Divided On Whether The MLA Requires Royalties To Be Based On The Value Of Production At The Geographic Location Of The Lease.

Under the MLA, federal lessees of mineral producing lands must pay royalties based on the "amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b)(1)(A). The Ninth Circuit and prior decisions of the D.C. Circuit have all recognized that the statutory phrase "amount or value of production * * * from the lease" means the amount or value of production at the geographic location of the lease. In conflict with those decisions, the decision below holds that the statute requires only that production originate at the lease—so that royalties can be based on the greater value of production that has been transported significant distances to off-lease locations and improved in quality to finished, end-use condition.

Long-established precedent from the Ninth Circuit holds that royalty values are to be determined at the wellhead point of production from the lease. See *United States* v.

Gen. Petroleum Corp., 73 F. Supp. 225, 254 (S.D. Cal. 1947) ("Natural-gas royalties are payable on the gas as it is produced *at the well*. It is the value of that gas which must be determined.") (emphasis added), aff'd, *Continental Oil Co.* v. *United States*, 184 F.2d 802, 820 (9th Cir. 1950) (royalties are "calculated values *at the wells* not at the pipe line destination") (emphasis added). The same precedent makes clear that, when costs are incurred to enhance the value of the production above the value of production at the lease, allowances must be made for the costs "in order to arrive at the value of the gas as originally produced." 73 F. Supp. at 254. Respondents try to distinguish those cases by ignoring the statutory construction issue and asserting that the Ninth Circuit did not address "whether gas was in marketable condition." Gov't Br. 14. But the Ninth Circuit squarely addressed the statutory interpretation question and declared that royalty values must be determined based on the production's market value at the wellhead point of production from the lease. See also *Marathon Oil Co.* v. *United States*, 604 F. Supp. 1375, 1386 (D. Alaska 1985) (holding that the statutory reference to "value of production" requires that "royalties be based on the value of production *at the lease*") (emphasis in original), aff'd, 807 F.2d 759, 765-766 (9th Cir. 1986).

The D.C. Circuit's decision in *Independent Petroleum Ass'n of America* v. *DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002), is to the same effect. In *DeWitt*, consistent with *General Petroleum* and *Marathon Oil*, the D.C. Circuit observed that "to abide by the *statutory mandate* to base royalty on the 'value of the production removed or sold from the lease,'" the agency allows deductions "when production is sold at a market away from the lease." 279 F.3d at 1037 (emphasis added). The *DeWitt* court's reference to deductions when production is sold at markets away from the lease under a "statutory mandate" makes sense only if the

statutory mandate is for royalty *valuation* at the lease, not that the production merely *originate* at the lease.

Here, the decision below reached the opposite result, holding that the MLA may be construed to mean that production need only originate at the lease, such that the agency may demand royalties based on the greatly enhanced value of production after it has been transported to off-lease facilities and improved in quality to finished, end-use condition. This Court should grant the petition to resolve this conflict of statutory interpretation among the courts.

B. The MMS's Own Regulations Require Royalties To Be Based On The Value Of Production At The Geographic Location Of The Lease.

1. The Department of Interior's regulations also require that royalties be based on the value of production at the geographic location of the lease.[1] That was the expressed intent of the MMS in the 1988 rulemaking that adopted the regulations at issue here. In its rulemaking, the MMS noted that it had been "MMS policy since 1961 to grant transportation allowances when production is moved to a sales point off the lease *in order to calculate the value of the product at the lease*." 53 Fed. Reg. 1230, 1257 (Jan. 15, 1988) (emphasis added). Pet. 21. The regulations do provide that valuations at the lease may be *derived* from sales or valuations at off-lease locations downstream from the lease. But where production is sold or valued based on market prices downstream from the lease, the MMS's regulations specify that the costs of "transportation, pro-

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[1] As one court has observed, the longstanding interpretation of the statutory value of production "recognized by Interior" and "affirmed by the courts" is that "it refers to the value of oil or gas *at the wells*." *Indep. Petroleum Ass'n of Am.* v. *Armstrong*, 91 F. Supp. 2d 117, 125 (D.D.C. 2000), rev'd in part, aff'd in part, *Indep. Petroleum Ass'n of Am.* v. *DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002).

cessing or manufacturing" are deducted in order to calculate a "net-back" or "work-back" value of production *at the lease*. 30 C.F.R. § 206.151; Pet. 21.

As respondents note, petitioner Amoco sold its production at the wellhead to a marketing affiliate and calculated royalty payments from third-party sales proceeds received by the affiliate at off-lease sales locations, reduced by costs incurred to transport and condition the production between the lease and the off-lease sales points. Gov't Br. 3.[2] That is the precise "net-back" or "work-back" method for "calculating market values of gas *at the lease*" that is specified by the regulations. 30 C.F.R. § 206.151 (emphasis added). To deny allowances for such costs results in royalty obligations that greatly exceed the value of production *at the lease*. Even if the MLA did not compel a royalty valuation at the lease, the agency cannot change the requirement of royalty valuation at the lease specified by its current regulations without a notice-and-comment rulemaking. *Fina Oil and Chem. Co.* v. *Norton*, 332 F.3d 672, 679 (D.C. Cir. 2003).

2. As respondents observe (Br. 9), MMS regulations also require that the lessee incur any costs required to "place gas in marketable condition" (30 C.F.R. § 206.152 (i)) and define gas in "marketable condition" as gas that is "sufficiently free from impurities and otherwise in a condition that [it] will be accepted by a purchaser under a sales contract typical for the field or area." 30 C.F.R. § 206.151. The court of appeals reasoned that petitioners could be required to incur off-lease costs under the marketable condition rule, because "[t]he regulation stipulating that producers are to place gas in marketable condition at no cost to the government does not contain a geographic element." Pet. 10a. That construction, however, cannot be reconciled with other regulations requiring that both the quantity and quality of

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[2] Both Amoco's sales prices at the wellhead and its royalty payments to the government were derived from market-value third-party sales received by Amoco's marketing affiliate.

production be measured *at the lease*. Pet. 20-22. Consistent with a correct construction of the MLA as requiring royalty valuations at the lease, where a producer sells its production for market value at the lease—as is the case here—that gas satisfies the marketable condition rule. Gov't Br. 3. *California Co.* v. *Udall*, 296 F.2d 384 (D.C. Cir. 1961) (gas is in marketable condition where it meets quality standards for sales under wellhead sales contracts); *Amerada Hess Corp.* v. *DOI*, 170 F.3d 1032, 1037 (10th Cir. 1999) (the marketable condition rule is inapplicable if the gas is marketable in the condition as it exists at or within a short distance of the well). Pet. 18-20. The fact that downstream purchasers may process the gas further and transport it to different geographic markets does not mean that the gas was somehow in unmarketable condition when it was sold in industry-standard condition at the lease or well-head.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Rebecca W. Watson,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* JICARILLA APACHE NATION IN SUPPORT OF PETITIONERS ON THE STATUTE OF LIMITATIONS QUESTION ONLY

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QUESTION PRESENTED

Whether the statute of limitations in 28 U.S.C. § 2415(a), which applies to "every *action for money damages* brought by the United States" and bars such actions "unless the *complaint* is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings . . . , whichever is later," applies to *administrative orders* of the Minerals Management Service requiring oil and gas companies to *pay additional royalties* and granting them a right to appeal *within the agency*, a question as to which the courts of appeals are in conflict.

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No. 05-669

IN THE

Supreme Court of the United States

BP America Production Company and
Atlantic Richfield Company,
Petitioners,

v.

Rebecca W. Watson,
Assistant Secretary of the Interior for Land
and Mineral Management, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* JICARILLA APACHE NATION IN SUPPORT OF PETITIONERS ON THE STATUTE OF LIMITATIONS QUESTION ONLY

The Jicarilla Apache Nation ("tribe") respectfully submits this brief as *amicus curiae* in support of petitioners BP America Production Company and Atlantic Richfield Company for a writ of certiorari on the statute of limitations question only; the tribe does not support petitioners' request for a writ of certiorari on the question of marketable condition. [1]

[1] No counsel for any party authored any portion of this brief and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief. All parties to this case have consented to the filing of this brief, as indicated in letters filed with the Court.

INTEREST OF *AMICUS CURIAE*

The Jicarilla Apache Nation is a federally recognized Indian tribe located in northwest New Mexico on the eastern edge of the San Juan Basin, which is the second largest natural gas field in the lower 48 states. The tribe is the lessor and royalty owner of over 100 oil and gas mining leases issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (2000). Royalties from oil and gas production on these leases provide about half of all the revenue used to pay for essential government services on the tribe's reservation.

Lessees on Indian and federal lands initially pay royalties based on their own reports of the volume and value of their oil and gas production. If and when audits of these reports are performed, in many instances the audits reveal that significant additional royalties are due. In those instances the Minerals Management Service ("MMS"), the agency in the Department of the Interior responsible for managing federal and Indian oil and gas royalties, issues orders to the oil and gas production companies requiring them to pay additional royalties to the lessor. Several such orders involving oil and gas produced from the Jicarilla Apache Reservation are on appeal before the MMS. In addition, the tribe is currently participating in or anticipates audits of other royalty issues.

These pending appeals and audits involve periods that stretch back more than six years from the date of the relevant MMS orders. If these proceedings are considered by the D.C. Circuit, where MMS is located, the tribe can receive additional royalties for the entire period at issue in each case, since the D.C. Circuit has found that the six-year statute of limitations in 28 U.S.C. § 2415(a) (2000) does not apply to administrative orders directing additional payments of royalties. If the proceedings are considered by the Tenth Circuit, however,

where the Jicarilla Apache Reservation is located, additional royalties due for periods more than six years from the dates of the relevant orders will not be collectible from the oil and gas companies. The amounts at issue are in the tens of millions of dollars and, if rendered uncollectible, will result in a windfall to the oil and gas companies: they will be rewarded for underreporting the amount of royalties they owed to the tribe. The Jicarilla Apache Nation therefore has a significant and substantial interest in the Court resolving the split in the circuits regarding the applicability of § 2415(a) to MMS orders for payment of additional royalties.

SUMMARY OF ARGUMENT

Petitioner oil and gas companies have asked this Court to grant a writ of certiorari on two questions, the statute of limitations and the proper royalty treatment of the costs of placing coalbed methane gas into marketable condition. The Jicarilla Apache Nation supports the petition for a writ of certiorari on the statute of limitations: this question is the subject of a split among at least three federal courts of appeals and has a substantial financial impact not only for the Jicarilla Apache Nation but also for other oil- and gas-owning tribes. The Jicarilla Apache Nation opposes certiorari on the marketable condition question for the reasons articulated in respondent United States' brief, and does not repeat those arguments here.